No. 93-526

OCT 29 1993

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

TONI DECOSSAF HERNANDEZ,

Petitioner,

versus

KMART CORPORATION, ET AL.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RODNEY A. SEYDEL, JR.
HOFFMAN, SUTTERFIELD, ENSENAT
& BANKSTON (APLC)
650 Poydras Street, Suite 2100
New Orleans, Louisiana 70130
Telephone (504) 523-1385

Attorney for Respondent

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether this Honorable Court should exercise its discretionary power of supervision where the district court appropriately denied petitioner's Motion for Leave to Amend Complaint, filed one week before trial, where plaintiff relied on a recent Louisiana appellate court decision that failed to extend, modify, or reverse the settled Louisiana jurisprudence?

2. Whether this Honorable Court should address an issue regarding the trial court's refusal to instruct the jury regarding causation when the petitioner failed to bring such issue before the United States Court of Appeals for the Fifth Circuit and failed to object at the time of the trial to such refusal, especially when the jury held that Kmart was liable for all of plaintiff's injuries, even those injuries arising from a pre-existing condition?

3. Whether the trial court appropriately excluded the testimony of petitioner's experts when such anticipated testimony fell within the realm of the common knowledge of the jury and no such expert testimony was needed for the jury to appropriately determine the comparative negligence/ fault of the parties under Louisiana law?

4. Whether the trial court was manifestly erroneous in denying post-verdict relief for petitioner Hernandez's loss of consortium claim?

LIST OF ALL PARTIES TO THE PROCEEDING

Respondent agrees with the parties set forth in the Petition for Writ of Certiorari. However, because the trial court correctly denied petitioner's Motion to Amend Complaint and name as parties Kmart No. 3387, Inc., and John Galloway, the store manager, such parties have no interest in this Court's decision.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF ALL PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUES AND RULES INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 8

ARGUMENT 10

I. The Lower Court Properly Denied Plaintiffs' Motion to Amend to Add Non-Diverse Parties Because Such Denial Was In Compliance With The Law of Louisiana's Highest Court and Followed the Dictate of Rules 15 and 16 of the Federal Rules of Civil Procedure 10

II. Petitioners Lost the Right to Appeal to this Court the District Court's Failure to Include a Jury Charge Because Petitioners Failed to Timely Object and Bring Such Issue Before the Appellate Court 15

III. The District Court Properly Excluded the Testimony of Petitioners' Experts In Accordance With FRE 702 and Daubert 17

IV. Denial of Loss of Consortium Claim Is Not An Abuse of Discretion 22

CONCLUSION 23

SUPPLEMENTAL APPENDIX A A25

TABLE OF AUTHORITIES

Cases **Page**

Adams v. Fidelity & Cas. Co.,
107 So. 2d 496 (La. App. 1st Cir. 1958) 13

Bergeron v. Kmart,
540 So. 2d 406, 408 (La. App. 1st Cir. 1989) 7, 21

Broussard v. Delchamps, Inc.,
571 So. 2d 855, 860 (La. App. 3d Cir. 1990),
writ denied, 575 So. 2d 370 (La. 1991) 22

Canter v. Koehring Co.,
283 So. 2d 716 (La. 1973) 6, 8, 12-15

Chitimacha Tribe v. Harry L. Laws Co.,
690 F.2d 1157, 1163 (5th Cir. 1982) 11

Coco v. Winston Indus., Inc.,
341 So. 2d 332, 334-35 (La. 1976) 7, 17, 22

Daubert v. Merrill Dow Pharmaceuticals, Inc.,
113 S. Ct. 2786 (1993) 17-20

Daves v. Payless Cashways, Inc.,
661 F.2d 1022, 1025 (5th Cir. 1981) 11

Dunaway v. Rester Refrigeration Serv., Inc.,
428 So. 2d 1064 (La. App. 1st Cir.),
writs denied, 433 So. 2d 1056, 1057 (La. 1983) 7

Elder v. Wal-Mart Stores, Inc.,
751 F. Supp. 639, 641 (E.D. La. 1990) 14

Freeman v. Wal-Mart Stores, Inc.,
775 F. Supp. 208, 210 (W.D. La. 1991) 14

Gregory v. Mitchell,
634 F.2d 199, 203 (5th Cir. 1981) 11

Hensgens v. Deere & Co.,
833 F.2d 1179 (5th Cir. 1987) 11

Holmes v. Great Atl. & Pac. Tea Co., 587 So. 2d 750
(La. App. 4th Cir. 1991), writ denied,
592 So. 2d 412 (La. 1992) 6, 8, 12-15

Housley v. Cerise,
579 So. 2d 973 (La. 1991) 6, 9, 15, 17

Huddleston v. Dwyer,
322 U.S. 232, 236 (1944) 15

Kavlich v. Kramer,
315 So. 2d 282, 284 (La. 1975) 7

Lailhengue v. Mobile Oil Corp.,
775 F. Supp. 908, 910 (E.D. La. 1991) 14

Miller v. Mahfouz,
563 So. 2d 1223, 1226 (La. App. 1st Cir. 1990) 23

Owen Equipment & Erection Co. v. Kroger,
437 U.S. 365, 378 (1978) 10

Perniciaro v. Brinch,
384 So. 2d 392, 395 (La. 1980) 17

Peters v. Five Star Marine Serv.,
898 F.2d 48 (5th Cir. 1990) 18, 20

Prudhomme v. Teneco Oil Co.,
955 F.2d 390, 393 (5th Cir. 1992) 11, 12

Towns v. Georgia Cas. & Sur. Co.,
459 So. 2d 124 (La. App. 2d Cir. 1984) 21, 22

Vanderbark v. Owens-Illinois Co.,
311 U.S. 538, 543 (1941) 15

Warner v. Great Atl. & Pac. Tea Co.,
583 So. 2d 61, 66 (La. App. 2d Cir. 1991) 22

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1332(A)(1) 4, 10

28 U.S.C. § 1441(a) 10

28 U.S.C. § 1447(e) 10

Rules

Federal Rule of Civil Procedure, Rule 15 ..... 9, 10

Federal Rules of Civil Procedure, Rule 16 ..... 5, 10, 12

Federal Rules of Civil Procedure, Rule 16(b)(1) 2, 9, 10, 12

Federal Rules of Civil Procedure, Rule 50(a)(1) 2, 5, 21

Federal Rules of Civil Procedure, Rule 51 ..... 2, 15, 16

Federal Rules of Evidence, Rule 401 20

Federal Rules of Evidence, Rule 702 17-20

United States Supreme Court Rule 10.1 ..... 2, 8, 15

United States Supreme Court Rule 10.1(a) 17, 22

United States Supreme Court Rule 10.1(c) 17

Other Authorities

3 **Weinstein & Berger**, ¶ 702[02], 702-18 20

No. 93-526

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

TONI DECOSSAF HERNANDEZ,

Petitioner,

versus

KMART CORPORATION, ET AL.,

Respondent.

RESPONSE BRIEF FOR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent respectfully requests that this Honorable Court deny petitioners' request that a Writ of Certiorari be granted to review the decision of the United States Fifth Circuit Court of Appeals in the instant case rendered on May 19, 1993.

OPINIONS BELOW

Respondent adopts petitioners' opinions below, and accordingly, will employ petitioners' appendixes regarding such opinions in this brief. However, in Appendix A, petitioners erroneously set forth the case number in the United States Court of Appeals for the Fifth Circuit as No. 92-3478. The correct case number is No. 92-3475.

JURISDICTION

Petitioner correctly seeks jurisdiction under 28 U.S.C. § 1254(1) through a Writ of Certiorari to this Court.

STATUES AND RULES INVOLVED

In addition to the statutes and rules that petitioners set forth in Appendix E, respondent sets forth in Supplemental Appendix A, Rule 16(b)(1), 50(a)(1), and 51 of the Federal Rules of Civil Procedure and United States Supreme Court Rule 10.1.

STATEMENT OF THE CASE

The Statement of the Case provided by the Petition for Writ of Certiorari is erroneous and inaccurate in several respects and incorrectly contains substantive arguments. Respondent will identify the inaccuracies in the order in which they appear and provide additional facts of the case on which respondent relies.

On July 26, 1989, plaintiff, Toni Hernandez, slipped in a small puddle of Sesame Street bubble bath or shampoo located in the health and beauty aids section of the Kmart store on Judge Perez Drive in Chalmette, Louisiana. (Vol. I, R. 278). On this shopping trip, plaintiff Hernandez was accompanied by her husband, Sherman, and her two children, Benjamin and Scarlet. Id. Petitioners failed to indicate that prior to her fall, she was looking straight ahead. (Tr. Vol. 5, p. 78), and that the spill was easily discernable several feet ahead of her. (Tr. Vol. 5, p. 55). Furthermore, Hernandez did not actually fall to the floor; instead, her husband caught her by the arm. (Vol. I, R. 278). However, she sustained injury to her left ankle and back as a result of the twisting motion used to prevent her fall. (Tr. Vol. 5, p. 54).

An examination of the record reveals that petitioners cannot substantiate that the color of the Kmart floor made it difficult for a customer to see spills on the floor. Furthermore, petitioners' allegations that Kmart had no safety and cleaning procedures in place at the time of the incident are unsupported. Kmart had a constant and continual clean up procedure ongoing at the time of the slip in the instant case. (Tr. Vol. 5, pp. 14-17, 22-24, 36-37, and 40).

Petitioners erroneously characterize the testimony of Camille Hebert, a Kmart employee. Ms. Hebert did not witness Hernandez slip, but heard someone shout "someone could be hurt." (Vol. II, R. 370 and Tr. Vol. 5, p. 27). Then, Ms. Hebert observed the plaintiff walking to the back of the store with her husband, rubbing her hip area, without assistance, and without limping. (Tr. Vol. 5, pp. 37-38). Although Ms. Hebert did not see the

substance on the floor before Hernandez's fall, that fact does not prove that Kmart failed to instruct its employees to inspect the aisles for such hazards.

Further, petitioners fail to substantiate the alleged testimony of Dr. McLachlan and Dr. Moss by reference to the record. In contrast to petitioners' allegations, respondent submits that the testimony of it orthopaedic surgeon revealed that the slip at Kmart did not cause the cyst located on Hernandez's left ankle to become active and symptomatic. (Tr. Vol. 4, pp. 183, 195, and 212).

Respondent further submits that petitioners' version of the action of the trial court below is incomplete, and therefore, inaccurate. On May 10, 1990, plaintiff, Toni Hernandez, filed a Petition for Damages in the Thirty-Fourth Judicial District Court for the Parish of St. Bernard, State of Louisiana. (Vol. I, R. 278-80). Subsequently, defendant Kmart, a non-citizen of Louisiana, successfully removed this suit to the United States District Court for the Eastern District of Louisiana based on diversity jurisdiction under 28 U.S.C. § 1332(A)(1). (See Vol. I, R. 273-75).

A preliminary conference was held before Judge Henry A. Mentz on July 8, 1991. At that time, the court set a deadline of August 2, 1991, for the filing of any amendments in the instant case. (Vol. I, R. 62). A pre-trial conference was subsequently held on December 20, 1991, where the plaintiffs failed to discuss their intention to file a Motion to Amend Complaint to add two non-diverse defendants. (See Vol. I, p. 28). Furthermore, in the Pre-Trial Order, plaintiffs' contested issues of fact failed to allege that John Galloway, the Kmart store manager, had a personal duty towards store customers. (Vol. I, R. 32). Furthermore, on December 23, 1991, at a pre-trial conference, petitioners only sought leave of the court

to file a Motion to Remand on the basis that petitioners' claim no longer met the requisite amount in controversy for diversity jurisdiction. (Vol. I, R. 26).

Instead of filing such motion, petitioners filed a Motion to Amend Complaint and Remand to the State Court on December 30, 1991, nearly five months after the scheduled deadline of August 2, 1991, and only one week prior to trial, seeking to add two non-diverse defendants, John Galloway, the store manager, and a Louisiana corporation, Kmart No. 3387, Inc. (Vol. I, R. 1, 3-6, 7-9). However, in a minut entry on January 3, 1992, the district court denied such motion, and trial proceeded on January 6, 1992. (Vol. II, R. 617-18).

As the record indicates, petitioners failed to seek leave of the court to file such amendment as required by the Rule 50(a)(1) of the Federal Rules of Civil Procedure, and further failed to file such petition with the district court. (Vol. I, R. 1). Instead, the Petition was attached to the Motion to Amend Complaint. (Vol. I, R. 7-9). Additionally, plaintiffs' Supplemental and Amending Petition indicated that such Petition was being filed with the Thirty-Fourth Judicial District Court for the Parish of St. Bernard, State of Louisiana, rather than the United States District Court for the Eastern District of Louisiana. (Vol. I, R. 7).

Regarding the trial court's denial of plaintiff's Motion for Leave to Amend, petitioners correctly state that the trial court denied such motion on the ground that plaintiff sought such amendment beyond the expiration delays provided by the district court's Rule 16 Scheduling Order. However, plaintiffs erroneously state that after the deadline for such amendments, the Louisiana Supreme Court decided the viability of a state law claim against a store manager. Such statement misinforms this Court because the case to

which the plaintiffs refer, Holmes v. Great Atl. & Pac. Tea Co., 587 So. 2d 750 (La. App. 4th Cir. 1991), writ denied, 592 So. 2d 412 (La. 1992), is a Louisiana Fourth Circuit Courts of Appeal decision, not a Louisiana Supreme Court case. Instead, a 1973 Louisiana Supreme Court case, Canter v. Koehring Co., 283 So. 2d 716 (La. 1973), decided years before the expiration date for amending a petition in the instant case, allowed such an action against a store manager if the injured customer alleged that the store manager breached a personal duty toward the store customer. Additionally, petitioners fail to substantiate the contention that the identity of the true owner of Kmart in Chalmette, Louisiana, was not discoverable until close to the trial date.

Regarding the trial court's refusal to instruct the jury according to the language cited from Housley v. Cerise, 579 So. 2d 973 (La. 1991), as suggested by Plaintiffs' Requested Jury Charge No. 47, (Vol. II, R. 475), the trial court submitted its own instructions regarding pre-existing injuries and causation of injuries. (See Vol. II, R. 571). Furthermore, this issue should not be before this Court because petitioners fail to appeal this issue to the United States Fifth Circuit Court of Appeals (see Petitioners' Brief to the Fifth Circuit), and as required, petitioners fail to timely object to the trial judge's refusal to issue such instruction. (Vol. II, R. 578).

Regarding the condition of the cyst, the petitioners contend that Toni Hernandez's cyst was asymptomatic before the accident. However, such conclusion is not substantiated by reference to the record. Furthermore, besides the petitioner's own testimony, nothing in the record indicates that the cyst became symptomatic concurrently with the twisting motion made by plaintiff Hernandez to prevent her fall.

Regarding the trial court's refusal to allow petitioners' expert to testify that close inspection was required for the small, clear puddle of the bubble bath or soap to be seen, petitioners erroneously suggest that the court imputed to plaintiff Hernandez knowledge of the existence of a hazard that she should have discovered. Instead, Louisiana law places a burden on a pedestrian to see if his path is clear and exercise ordinary care to see obstructions in his pathway. (Bergeron v. Kmart, 540 So. 2d 406, 408 (La. App. 1st Cir. 1989) (citing Dunaway v. Rester Refrigeration Serv., Inc., 428 So. 2d 1064 (La. App. 1st Cir.), writs denied, 433 So. 2d 1056, 1057 (La. 1983)). However, in a self-service store, a patron is burdened with a diminished duty to see what should have been seen because his attention is presumed to be on the display shelves. Kavlich v. Kramer, 315 So. 2d 282, 284 (La. 1975). However, the record indicates that plaintiff was looking straight ahead, not at the display shelf, when her slip occurred. (Tr. Vol. 5, p. 78). Furthermore, such experts could not offer testimony that was beyond the jury's realm of common knowledge. (See Defendant's Memorandum in Support of Motion in Limine to Exclude Expert Testimony -Vol. II, R. 589-93).

Petitioners state that the evidence was uncontradicted that Mr. and Mrs. Hernandez had frequent sexual relations and that such sexual relations diminished upon Mrs. Hernandez's injury. Such evidence came only from the plaintiffs' testimony, and although it may have been uncontradicted, the trial court had the opportunity to witness the plaintiffs' demeanor and made a determination on the merits of this claim. Coco v. Winston Indus., Inc., 341 So. 2d 332, 334-35 (La. 1976).

SUMMARY OF THE ARGUMENT

Petitioners present four questions to this Court claiming that the issues contained therein merit this Court's exercise of its discretionary review of appellate decisions. However, none of the four issues contain the special and important reasons warranting judicial discretion by the United States Supreme Court as exemplified in Supreme Court Rule 10.1. Specifically, no appellate circuits conflict on any of the four issues, a federal question is not involved, the accepted and usual course of judicial proceedings have been followed, no two state courts of last resort are in conflict on such issues, such issues do not involve federal law questions that should be settled by this Court, and the decision of the United States Fifth Circuit Court of Appeal does not conflict with the Louisiana state court of last resort, the Louisiana Supreme Court. Although the listing contained in Supreme Court Rule 10.1 is not exclusive, the issues brought by the petitioner are not extraordinary and sufficiently important to deserve this Court's attention.

In addition to the questions presented not being worthy of this Court's discretionary review under Supreme Court Rule 10.1, this Petition should be denied for the following reasons:

(1) The recent decision of Holmes v. Great Atl. & Pac. Tea Co., 587 So. 2d 750 (La. App. 4th Cir. 1991), writ denied, 592 So. 2d 412 (La. 1992), does not provide a res nova cause of action nor does such case extend, clarify, or modify the cause of action allowed by the 1973 Louisiana Supreme Court decision in Canter v. Koehring Co., 283 So. 2d 716 (La. 1973). Therefore, petitioner has no justifiable excuse

for her delay in filing her Motion to Amend Complaint, and thus, the district court properly denied such motion under the authority of Rules 15 and 16(b)(1) of the Federal Rules of Civil Procedure by exercising its discretion in managing its docket by the timely disposition of matters before the court.

(2) Petitioner failed to timely object to the district court judge's refusal to administer the Housley jury charge regarding cau sation of damages, and failed to bring such issue for review to the United States Court of Appeals for the Fifth Circuit; thus, such issue is improperly before this Court.

(3) The district court appropriately excluded the opinions of petitioners' experts because their anticipated testimony fit within the realm of the jury's common knowledge and would not assist the jury in their determination of the comparative fault of the parties.

(4) The trial court properly denied petitioners' Motion for New Trial on her loss of consortium claim because the jury did not abuse its discretion in denying such award.

ARGUMENT

I. The Lower Court Properly Denied Plaintiffs' Motion to Amend to Add Non-Diverse Parties Because Such Denial Was In Compliance With The Law of Louisiana's Highest Court and Followed the Dictate of Rules 15 and 16 of the Federal Rules of Civil Procedure.

The instant case was properly removed to federal court under the authority of 28 U.S.C. § 1441(a) because the original parties were citizens of different states; therefore, diversity jurisdiction was appropriate under 28 U.S.C. § 1332(A)(1). On the eve of trial, petitioners filed a Motion to Amend Complaint and to Remand to State Court by attempting to join two non-diverse defendants and destroy diversity subject matter jurisdiction. According to 28 U.S.C. § 1447(e), when a plaintiff seeks to join such additional non-diverse defendants, "the court may deny joinder, or permit joinder and remand action to the State court." 28 U.S.C. § 1447(e) (1988). Hence, the court has discretion in denying or permitting such joinder. However, addition of a non-diverse party defeats subject matter jurisdiction. Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 378 (1978).

In the instant case, the district court decided that the joinder of additional parties did not satisfy the requirements Rule 15 of the Federal Rules of Civil Procedure and was untimely according to the Rule 16(b)(1) schedule deadline for such amendments. (See App. E (Rule 15) and Supp. App. A (Rule 16(b)(1)). If a party does not amend before a responsive pleading is served, then the party may only amend through leave of the court or by written consent of an adverse party, and such leave "shall be freely given when justice so requires." FED. R. CIV. P. 15(a).

In Hensgens v. Deere & Co., 833 F.2d 1179 (5th Cir. 1987), the United States Fifth Circuit Court of Appeals outlined several factors that a court should employ in determining whether leave to amend should be granted. The court should consider: (1) the extent to which the purpose of the amendment is to defeat jurisdiction; (2) whether plaintiff has been dilatory in seeking such amendment; (3) whether plaintiff will be significantly injured or prejudiced if the amendment is not granted; and (4) any other factors bearing on fairness and equity. Id. at 1182. Furthermore, "the court should consider judicial economy and whether the amendments will lead to expeditious disposition of the merits of the litigation." Chitimacha Tribe v. Harry L. Laws Co., 690 F.2d 1157, 1163 (5th Cir. 1982).

Regarding the Hensgens factors, the trial court properly decided that such factors weighed in favor of denying petitioners' amendment. First, respondent asserts that petitioners had ample time to seek leave of court to amend prior to the eve of the trial. Although mere passage of time does not mandate denial of a motion to amend, delay becomes fatal at some point. Gregory v. Mitchell, 634 F.2d 199, 203 (5th Cir. 1981). Therefore, when such delay occurs, the mover has to prove the delay was due to excusable neglect. Daves v. Payless Cashways, Inc., 661 F.2d 1022, 1025 (5th Cir. 1981). In the instant case, August 2, 1991, served as the scheduled deadline for filing all amendments. However, petitioner did not submit the amendment in question until December 30, 1991, one week before the scheduled trial of January 6, 1992. Such "eve of trial" amendments are generally disfavored by the court. Prudhomme v. Teneco Oil Co., 955 F.2d 390, 393 (5th Cir. 1992).

Furthermore, Rule 16(b)(1) of the Federal Rules of Civil Procedure mandates that the judge:

> shall, after consulting with the attorneys for the parties in any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time (1) to join other parties and to amend the pleadings; ...

FED. R. CIV. P. 16(b)(1) (emphasis added).

Therefore, Rule 16 provides the district court judge with the power to enforce the date set by such scheduling conference. Moreover, a federal district court has broad discretion over the management of its docket and has the ability to timely enforce the disposition of matters before such court. Prudhomme, 955 F.2d at 392.

Petitioners contend that the delay in filing a Motion to Amend to add two non-diverse defendants was not motivated to fraudulently join such parties and defeat diversity jurisdiction but was excusable because of the recent Louisiana Fourth Circuit Courts of Appeal decision in Holmes v. Great Atl. & Pac. Tea Co., 587 So. 2d 750 (La. App. 4th Cir. 1991), writ denied, 592 So. 2d 412 (La. 1992). However, Holmes that decision did not create a new cause of action or clarify an action against a store manager in a Louisiana state court as petitioner alleges. Instead, such an action was viable under the 1973 decision of the Louisiana Supreme Court in Canter v. Koehring Co., 283 So. 2d 716, 722 (La. 1973).

In Canter, the Louisiana Supreme Court held that if an officer, agent, or employee of a corporation breaches a personal duty toward the injured plaintiff, breach of which specifically has caused the plaintiff damages, then personal liability can be imposed on such officer, agent, or employee. 283 So. 2d at 722. However, adopting the reasoning set forth

in Adams v. Fidelity & Cas. Co., 107 So. 2d 496 (La. App. 1st Cir. 1958), "such personal liability cannot be imposed upon the officer, agent, or employee simply because of his general administrative responsibility for performance of some function of the employment." Canter, 283 So. 2d at 721. In fact, in Canter, the court found that one of the construction engineers was not personally negligent because the plaintiff could not prove that this engineer committed an affirmative act; for example, delegating his responsibility to an incompetent subordinate, aiding the subordinate in the negligent act, and knowing of a subordinate's breach of duty and failing to act within a reasonable time to repair such breach. Id. at 727. Hence, Canter requires an affirmative act on the part of the employee to impose a breach of a personal duty.

Therefore, since 1973, in Louisiana, plaintiffs in slip and fall accidents had the ability to sue a store manager by employing the requirements of Canter that the employee must breach a personal duty. Canter allowed such action generally against any employee, officer, or agent of a corporation. 283 So. 2d at 722. Holmes merely approved of such action in the specific context of a store manager. 587 So. 2d at 752-53. Therefore, Holmes confirmed the cause of action that Canter permitted years ago. Hence, prior to August 2, 1991, the expiration date for the filing of all amendments in the instant case, petitioners could have relied on Canter to allege specific affirmative acts that indicated a breach of personal duty by the store manager, John Galloway, as the plaintiff eventually did in her untimely amendment, and such action would have been granted.

However, petitioners erroneously relied on Holmes for establishing a cause of action against the store manager, but Holmes is only significant in that prior to that decision, the petitions of other plaintiffs failed to allege breach of

any personal duty by the store manager. See Elder v. Wal-Mart Stores, Inc., 751 F. Supp. 639, 641 (E.D. La. 1990), and Lailhengue v. Mobile Oil Corp., 775 F. Supp. 908, 910 (E.D. La. 1991). Instead, the plaintiffs in such cases generally alleged that the employees involved were personally liable as a result of their duties as employees of the company, not for a breach of a personal duty. See id. However, Canter mandated that a personal duty must be owed and breached to the plaintiff. 283 So. 2d at 727. Finally, the plaintiffs in Holmes, 587 So. 2d at 752-53, and Freeman v. Wal-Mart Stores, Inc., 775 F. Supp. 208, 210 (W.D. La. 1991), following the mandate of Canter, specifically and appropriately alleged that the store managers breached a personal duty against them, and thus, the respective courts granted such actions.

Therefore, based on the holding of Canter alone, if petitioners in the instant case had named the store manager in the original Petition, alleging that such manager breached a personal duty, as the plaintiffs did in Holmes and Freeman, then the cause of action against the store manager would have been both timely and viable. However, petitioners misinform this Honorable Court by stating Holmes creates or clarifies Louisiana law. Since Canter, Louisiana law has always permitted such a cause of action against a store manager if the petitioner alleged that the store manager breached a personal duty. Because petitioner's reliance on Holmes is meritless and is not excusable neglect, the lower courts properly denied the Motion to Amend, ruling that plaintiffs fraudulently joined such non-diverse defendants.

Furthermore, "until such time as the case is no longer sub judice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state

court." Huddleston v. Dwyer, 322 U.S. 232, 236 (1944) (per curiam) (quoting Vanderbark v. Owens-Illinois Co., 311 U.S. 538, 543 (1941)). In Louisiana, Canter serves as the controlling decision of the highest state court, the Louisiana Supreme Court, on the issue of a personal action against an employee of a corporation. Holmes did not modify, extend, or clarify Canter. Therefore, no conflict exists between the decision rendered by the United States Court of Appeals for the Fifth Circuit in the instant case and Canter. Hence, under Supreme Court Rule 10.1, petitioners' first issue does not merit review by this Honorable Court.

II. Petitioners Lost the Right to Appeal to this Court the District Court's Failure to Include a Jury Charge Because Petitioners Failed to Timely Object and Bring Such Issue Before the Appellate Court.

Petitioners' question presented regarding the district court's denial of a fair trial because of its refusal to give plaintiffs' requested jury charge on causation of damages should also fail because such issue was not properly preserved for review by this Court. Rule 51 of the Federal Rules of Civil Procedure mandates that any proposed jury charge by a party that is not administered by the court cannot be assigned as an error "unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." FED. R. CIV. P. 51. In the instant case, No. 47 of Plaintiffs' Second Set of Supplemental Jury Charges submits the following proposed instruction, relying on Housley v. Cerise, 579 So. 2d 973 (La. 1991).

> You may presume that Mrs. Hernandez's injury resulted in her slip in Kmart if you are satisfied that before the accident she was in good health, but following the accident the symptoms of her disabling condition appeared and continuously manifested themselves afterwards providing that

> the medical evidence showed that there was a reasonable possibility of casual connection between the accident and the disability condition.

(Vol. II, R. 475).

However, the district court elected not to instruct the jury as plaintiffs requested. Instead, Judge Mentz instructed the jury in the following manner:

> In assessing damages you may consider only the suffering and other damages directly caused by the accident. The Defendant is not responsible for suffering or other damages caused by ailments which existed before the accident. However, the Defendant takes the Plaintiff as he finds him - and if the defendant's negligence results in aggravation of a latent previous condition - then the Defendant is liable for such aggravation of the preexisting condition - and is not granted immunity from liability because of a greater susceptibility to injury on the part of a Plaintiff with a preexisting condition. The Plaintiff, however, is not entitled to damages resulting from the normal course of a preexisting condition.

(Vol. II, R. 571).

However, an examination of the trial record reveals that plaintiff failed to make any objection to the district court judge's failure to administer charge No. 47 of Plaintiffs' Second Set of Supplemental Jury Charges. In addition, on page 578 of the record, no notation regarding plaintiffs' objection to the failure to administer this charge was recorded on things done outside the jury's presence. (See Vol. II, R. 578). Hence, because of the failure to object before the jury retired, plaintiffs have waived their privilege to submit as an error the failure of the district court judge to administer such jury charge. Although petitioners in their request for new trial presented the trial court's failure to provide the requested jury instruction regarding medical causation as a reason for granting a new trial (Vol. II, R. 297), such

allegation does not rise to satisfy the requirement of Rule 51 that the party's objection to the trial court's failure to administer a jury instruction be made prior to the time that the jury retires. Furthermore, plaintiff failed to preserve this error for review of this Court by not addressing such issue in the brief to the United States Fifth Circuit Court of Appeals. (See Petitioners' Brief to Fifth Circuit).

Because petitioners failed to properly object to the court's failure to administer the Housley jury charge, plaintiffs' related contentions of error stemming from such refusal are also warrantless. Hence, plaintiffs' request to this Court for review on the issue of quantum must fall. Furthermore, "before a court of appeal can disturb an award made by a trial court[,] the record must clearly reveal that the trier of fact abused his discretion in making his award." Perniciaro v. Brinch, 384 So. 2d 392, 395 (La. 1980) (citing CoCo v. Winston Indus., Inc., 341 So. 2d 332, 334-35 (La. 1977)). Petitioners fail to indicate how the trier of fact abused its discretion in awarding $10,000 in general damages to the plaintiff. Petitioners' only arguments regarding quantum stem from the district court judge's refusal to properly instruct the jury, which is not properly before this Court. Therefore, this Court should not exercise its discretionary jurisdiction under Supreme Court Rule 10.1(a) to address this issue.

III. The District Court Properly Excluded the Testimony of Petitioners' Experts In Accordance With FRE 702 and Daubert.

The district court's grant of defendant's Motion in Limine to exclude the expert testimony of Wilford Gallardo and Dennis Howard, safety experts, and Gordon Goldman, a physicist, is not an issue worthy of this Court's review under Supreme Court Rule 10.1(c). Supreme Court Rule 10.1(c) provides that when a state court or a federal appellate court "has decided a federal question in a way that conflicts with applicable decisions of this court," this Court's jurisdiction should be exercised. Petitioners suggest that the trial court's refusal to allow the

testimony of these three individuals is in conflict with this Court's recent decision in Daubert v. Merrill Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993). However, respondent contends that no such conflict exists and that such issue does not merit review by this Court.

Rule 702 of the Federal Rules of Evidence allows testimony by experts:

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702 (emphasis added). Respondent submits that the anticipated testimony of petitioner's experts in the instant case does not satisfy the requirement of Rule 702 of the Federal Rules of Evidence that such testimony enhance the jury's understanding in determining comparative fault.

When the trial judge decided on defendant's Motion in Limine, the mandate regarding such expert testimony was set forth by the United States Fifth Circuit Court of Appeals, the controlling jurisdiction, in Peters v. Five Star Marine Serv., 898 F.2d 48 (5th Cir. 1990). In Peters, the district court judge, Judge Adrian Duplantier, refused to allow the testimony of a maritime operations expert regarding the cleanliness of the ship's deck and the proper stowage of cargo because the subject matter of such expert was within the realm of the type of things that ordinary people, such as those present on a jury, could determine by using their common sense. 898 F.2d at 449. The Fifth Circuit affirmed Judge Duplantier's decision in preventing the plaintiff's

expert testimony, stating "that the jury could adeptly assess the situation using only their common experience and knowledge. Expert testimony was unnecessary, and thus the decision to exclude the testimony was within the [broad] discretion of the trial judge." Id. at 450.

As defendant suggested in its Motion for Limine, plaintiffs' experts, Gallardo and Howard, failed to conduct special tests regarding the reasonableness of Kmart's clean up and inspection procedures; thus, the conclusions that were reached in such experts' reports were simply those that could be made by any citizen, based upon their common sense and knowledge. Therefore, respondent submits that the trial judge did not abuse his discretion in denying such testimony.

Regarding the anticipated testimony of plaintiffs' other expert, Gordon Goldman, a physicist, respondent further contends that such testimony invaded the province of the jury. At trial, defendant did not contest the fact that the substance found on Kmart's floor was slippery. Thus, Goldman's use of a "slip-o-meter" and his conduction of a coefficient of friction test has no relevance to the reasonableness of Kmart's inspection and clean up procedures. Furthermore, Goldman, in his report, admitted that the slipperiness of bubble bath or shampoo is a widely known fact. Hence, the testimony that could be provided by Goldman was within the realm of the common knowledge of the average person sitting on a jury. Because plaintiffs' proposed experts failed to offer any assistance to the members of the jury, the trial judge properly excluded such testimony.

Furthermore, petitioners erroneously contend that the district court's decision is in conflict with this Court's recent decision in Daubert, regarding the proper standard for admission of expert testimony under the guidelines of Rule 702 of the Federal Rules of Evidence. First, petitioners fail to note that the true holding of Daubert was that the Frye test, the "general acceptance" test, was superseded by the adoption of the Federal Rules of Evidence. Daubert, 113 S. Ct. at 2793. That is, Rule 702 of the Federal Rules of Evidence does not require that the scientific technique employed by the proposed expert be "generally accepted" as reliable in the relevant scientific community. Id. at 2792, 2794.

However, this Court in Daubert did note that the expert's testimony must "assist the trier of fact to understand the evidence or determine a fact in issue." Id. at 2795. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." Id. (quoting 3 **Weinstein & Berger**, ¶ 702[02], 702-18). Hence, an expert's testimony will fail the relevancy test under Rule 401 of the Federal Rules of Evidence if it does not assist the trier of fact to understand an issue. Therefore, the Daubert Court did not implicitly or explicitly overrule the Peters decision on which the district court judge in the instant case relied.

Therefore, the district court's decision to exclude plaintiffs' proposed experts' testimony was not in direct conflict with Daubert. Instead, such decision followed the mandate of Daubert, Peters, and Rule 702 of the Federal Rules of Evidence that an expert's testimony must assist the trier of fact in understanding the issue beyond the common knowledge of the jury. As aforementioned, in the instant case, the petitioners' proposed experts could not meet such standard. Therefore, such testimony was not needed to assist the jury in determining the comparative fault of the parties. Hence, because no conflict exists between the district court's decision and this

Court's in Daubert, this issue does not merit this Court's discretionary review.

Furthermore, manifest error must exist for a question of fact such as comparative fault to be disturbed on appeal. Towns v. Georgia Cas. & Sur. Co., 459 So. 2d 124 (La. App. 2d Cir. 1984). Pursuant to Rule 50(a)(1) of the Federal Rules of Civil Procedure, to succeed on a Judgment as a Matter of Law, the court must determine that "no legally sufficient evidentiary basis" is contained in the record to uphold the jury's verdict. FED. R. CIV. P. 50(a)(1). However, as the trial court noted in its Order and Reasons regarding plaintiff's Motion for Judgment as a Matter of Law, plaintiffs attempted to rely on evidence not deemed admissible at trial. The trial court found that sufficient admissible evidence existed that Hernandez was comparatively negligent by not seeing the puddle of liquid located in the middle of the aisle at Kmart.

At trial, plaintiff Toni Hernandez admitted that she was not looking at the displays and merchandise but looking straight ahead when the slip occurred. (Tr. Vol. 5, p. 78). Furthermore, plaintiff admitted that after the accident, she also noticed a puddle of liquid shampoo from a distance several feet in front of her, (Tr. Vol. 5, p. 55), thereby suggesting that if she had been paying adequate attention, she would have noticed the puddle that caused her slip. Because plaintiff's attention was not diverted to the display shelves, she is not entitled to the presumption that "a patron has a diminished duty to see that which should be seen because his attention is presumed to be attracted to the advertised goods on the shelves." Bergeron v. Kmart Corp., 540 So. 2d 406, 408 (La. App. 1st Cir.), writs denied, 544 So. 2d 408, 412 (La. 1989).

Respondent suggests that after a review of the admitted evidence, the trier of fact properly assigned twenty-five percent comparative negligence to the plaintiff. Therefore, because the testimony of plaintiffs' proposed experts was properly excluded and because plaintiff is not entitled to the diminished duty of a store customer because her attention was on her path, the comparative fault issue does not merit this Court's discretionary review.

IV. Denial of Loss of Consortium Claim Is Not An Abuse of Discretion.

Respondent submits that the trial court's denial of plaintiffs' loss of consortium claim does not merit exercise of this Court's supervisory jurisdiction under Supreme Court Rule 10.1(a). Petitioner must overcome several burdens in obtaining a reversal of such decision. First, to establish a loss of consortium claim, petitioners must prove one of the following elements by a preponderance of the evidence, the loss of: "(1) love and affection, (2) society and companionship, (3) sexual relations, (4) the right of performance and material services, (5) the right of support of husband, (6) aid and assistance, and (7) loss of felicity." Warner v. Great Atl. & Pac. Tea Co., 583 So. 2d 61, 66 (La. App. 2d Cir. 1991). Furthermore, a jury's assessment of damages will not be overturned unless an appellate court finds that the jury abused its wide discretion. Towns, 459 So. 2d at 126. Moreover, the reviewing court cannot substitute its subjective belief of the appropriate amount of damages for that of the trier of fact. Broussard v. Delchamps, Inc., 571 So. 2d 855, 860 (La. App. 3d Cir. 1990), writ denied, 575 So. 2d 370 (La. 1991). Finally, an appellate court cannot reverse the decision of a trier of fact involving evaluation of a witness' credibility and

demeanor unless such decision is manifestly erroneous. Coco v. Winston Indus., Inc., 341 So. 2d 332, 334-35 (La. 1976).

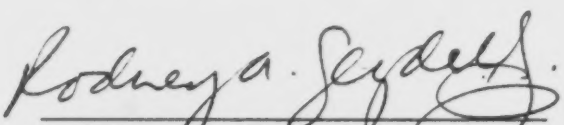
In the instant case, plaintiff's husband, Sherman Hernandez, testified that he had sexual relations with his wife once or twice a day, every single day. (Tr. Vol. 4, p. 63). Such self-serving testimony is insufficient in sustaining an award for loss of consortium. See Miller v. Mahfouz, 563 So. 2d 1223, 1226 (La. App. 1st Cir. 1990). Furthermore, plaintiff, Toni Hernandez, testified that she was bedridden for four months and unable to perform any chores or services in her home. (Tr. Vol. 4, p. 56). However, Dr. McLachlan, her treating orthopaedic surgeon, did not prescribe bedrest. (Tr. Vol. 4, p. 250). Thus, plaintiff Hernandez's testimony is not medically supported.

Because the plaintiffs failed to support a claim for loss of consortium by a preponderance of the evidence, the jury's award cannot be disturbed, and thus, no miscarriage of justice resulted. Hence, the jury's failure to award damages for loss of consortium is not worthy of this Court's supervisory jurisdiction.

CONCLUSION

For the aforementioned reasons, this Honorable Court should deny petitioners' Writ of Certiorari and deny review of all questions presented in such Petition. Furthermore, respondent respectfully submits that this Court should uphold the judgment of the courts below and deny petitioners' request for remand for a new trial.

Respectfully submitted,

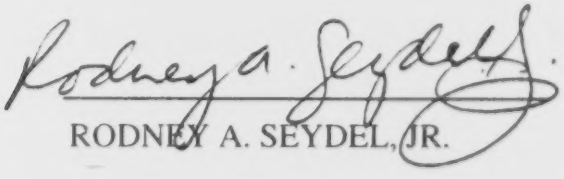


RODNEY A. SEYDEL, JR.
HOFFMAN, SUTTERFIELD, ENSENAT
& BANKSTON (APLC)
650 Poydras Street, Suite 2100
New Orleans, Louisiana 70130
Telephone (504) 523-1385

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record herein by United States mail, first class postage prepaid, by mailing a copy thereof, to John E. Ruiz, Jr., Esq., attorney for plaintiff, at the following address, this 29th day of October, 1993:

John E. Ruiz, Jr., Esq.
P. O. Box 791180
New Orleans, Louisiana 70179-1180



RODNEY A. SEYDEL, JR.

SUPPLEMENTAL APPENDIX A

EXCERPTS OF STATUTES AND RULES INVOLVED

Rule 16(b)(1) of the Federal Rules of Civil Procedure provides:

(b) Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

. . . .

Rule 50(a)(1) of the Federal Rules of Civil Procedure provides:

(a)(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

. . . .

Rule 51 of the Federal Rules of Civil Procedure provides:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or

after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

. . . .

Rule 10.1 of the Rules of the Supreme Court provides:

1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question n a way that conflicts with applicable decisions of this Court.